

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Emery G. Stordahl,

Petitioner,

FACT,

V.

RECOMMENDATION,

MEMORANDUM

City of Moorhead,

Respondent.

FINDINGS OF

CONCLUSIONS,

AND

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on June 26, 1991, in Moorhead. The hearing was held pursuant to a Notice of Petition and Order for Hearing dated March 27, 1991.

John T. Schneider, of the firm of Schneider, Schneider & Schneider, 815 Third Avenue South, Fargo, North Dakota 58103, appeared on behalf of Emery G. Stordahl, the Petitioner herein. Brian D. Neugebauer, of the firm of Ohnstad Twitchell Law Firm, First National Bank ND Building, 901 - 13th Avenue East, P.O. Box 458, West Fargo, North Dakota 58078-0458, appeared on behalf of the City of Moorhead, the Respondent herein. The record closed upon receipt of simultaneous briefs on July 17, 1991.

This Report is a recommendation, not a final decision, The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the

Commissioner. Parties should contact Bernie Melter, Commissioner of Veterans Affairs, Second Floor, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Was Petitioner's job abolished in good faith, or was it abolished as a subterfuge to oust him from his position?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Petitioner, Emery G Stordahl, was born on January 15, 1924. He served in the United States Army from April 1946 to August 1947. He was honorably discharged. Following his discharge, Stordahl worked for construction

companies, a creamery, and a hardware store. Then, on September 29, 1957, he took a job with the City of Moorhead, and remained with the City of Moorhead until December 31, 1985. As will be discussed more fully below, he was constructively terminated as of that date.

2. In the fall of 1984, the Moorhead City Charter was substantially amended. Prior to then, Moorhead had been governed by a strong council/weak mayor form of government. The change in the City Charter instituted a city manager form. In May of 1985, Robert Erickson became the first city manager. He promptly prepared a 41-page reorganization plan which contained 96 specific proposals for changes in the administrative functioning of the City. This plan, entitled "Moorhead in Motion", begins with an introductory section which contains the following:

The reorganization could not be more timely, recognizing the federal government's steady withdrawal of various funding mechanisms, i.e., the elimination of revenue sharing by September 30, 1986, community development block grant entitlements (CDBG) being cut 15% and mass transit assistance being reduced 15%. With the growing federal deficit, it's clear the City of Moorhead will have to prioritize the use of its resources.

The plan's recommendations encompass all departments of the City: Administrative Services, Community Development, Public Works, Police and Fire. For each of the recommendations that has an immediate fiscal impact, there is a specific dollar amount stated.

3. Recommendation No. 5 reads as follows:

Eliminate the position of building superintendent.
\$33,000 savings. Effective date of departure will be 12/31/85, including accumulated vacation days.

Rationale:

The majority of the job responsibilities for this position have been eliminated through the disbanding of the building committee. Residual responsibilities can be more cost effectively accomplished by way of service contracts and the heating, ventilation and air conditioning (HVAC) systems engineer.

4. The "Moorhead in Motion" reorganization plan was formally submitted to the City Council on September 6, 1985, and was adopted (with modifications and withdrawals of certain recommendations) on October 7, 1985. There were no changes to Recommendation No. 5.

5. Emery Stordahl became aware of the Moorhead in Motion plan, and its potential impact on him, in July of 1985. At that time, he was told verbally that it contained a proposed elimination of his job. On October 11, he received a memorandum from his direct supervisor, Gerald H. Sorenson (then finance director) indicating that Sorenson needed to have some idea of when Stordahl would be retiring in order for Sorenson to plan for the 1986 budget.

On October 23, 1985, Stordahl was sent a formal letter indicating that his

position would be eliminated as of December 31, 1985. The letter indicated that there were several positions being eliminated throughout the City as a result of the reorganization and that the affected individuals are of a wide variety of seniority and ages, and that the City does not intend to re-establish the positions. The letter invites Stordahl, however, to apply for other positions within the City which open up in the future, including seasonal ones. The letter ends:

You have served the city well, you are leaving in good standing, and we would certainly be interested in considering your application if a suitable opportunity presents itself.

Ex . 2 .

6. On December 17, 1985, Stordahl submitted a letter to the City, indicating that he was being forced to submit an application for retirement commencing January 1, 1986, but that he would be adversely affected by it, and was submitting to it "under protest". Ex. 4. Stordahl did, in fact, leave the City's employ effective December 31, 1985.

7. Stordahl had held a variety of positions with the City since 1957. He began as an assistant to the City Sanitarian, where he did restaurant, milk and garbage inspections. He became City Sanitarian in approximately 1959, and stayed in that job until 1980. He then became the Director of Health Services, and then the Director of Energy. In 1982, he became the Superintendent of Buildings, the position he held until he left the City at the end of 1985.

8. Stordahl's duties as Building Superintendent were initially defined in May of 1982, when the job was created. Ex. 14. They included seven major categories as follows:

1. Monitoring the construction, remodeling, and/or repair of city buildings to assure contractual compliance with plans and specifications.
2. Designing and implementing preventative maintenance plans for city buildings.
3. Providing staff liaison to the building committee, including preparing agendas, notifying participants of meetings, and recording minutes of meetings.
4. Developing and implementing custodial procedures for city buildings.
5. Assisting department heads in evaluating insurance coverage.
6. Monitoring energy use in city buildings and assuring compliance with handicap regulations.
7. Developing, implementing and administering special

assignments, new projects and programs related to physical plant and facilities.

These assignments, set forth in a job description (Ex. 23), do not give a full flavor of what Stordahl actually did. In actuality, he unlocked the City Hall each morning and prepared it for use. He checked the furnace, air conditioning and air handling equipment. He then went to the post office, where he picked up all the mail for the City, sorted it and distributed it. He then went to the City Clerk's office, where he checked a spindle for maintenance work that needed to be done, and then either did it himself, or saw that it got done by someone else. If there was a running toilet or a leaky faucet, it would be noted on a slip of paper on the spindle. If there was a lightbulb that needed replacing, a chair that needed fixing, or a desk drawer that was stuck, those would be reported there too. If room dividers needed to be moved around, or a wall or door needed to be replaced, they would be noted there too. In addition to these tasks, Stordahl supervised the City's part-time janitors and ordered janitorial supplies.

9. The City's building committee made decisions about new construction and other major decisions about the City's physical plant. For example, the committee was deeply involved in the planning and construction of a new maintenance center, a new armory, and the Plains Art Museum. The committee met intermittently, depending upon the intensity of its projects. When it was first established, it met weekly, but then its meetings dropped off to the point where in its last year (1984 or 1985) it only met eight to ten times during the year. It was ultimately disbanded.

10. When Stordahl left the City, a number of his duties were contracted out to private firms, some were assigned to other City employees, and others were just dropped. Set forth below is a summary of his duties and what happened to them.

Duties	Outcome
1. Duties That Were Eliminated	
A. Provide staff liaison to Building Committee	Building Committee eliminated
B. Monitor energy use and recommend changes	Task completed by end of 1985
C. Supervision of part-time janitors	Positions eliminated in 1986
D. Assist in determining adequate insurance coverage	Task completed by end of 1985

2. Duties Contracted Out to
Private Entities

A. Opening City Hall and offices

Contracted to
Moorhead Center Mall

B. Maintenance of HVAC equipment

Contracted out to
private entity

- | | | |
|----|---|------------------------------------|
| C. | Miscellaneous building repairs, including plumbing and electrical | Contracted out to private entities |
| D. | Monitoring construction or remodeling of buildings | Contracted to architects |
3. Duties Reassigned to Other City Employees
- | | | |
|----|--------------------------------------|----------------------------------|
| A. | Opening and distributing mail | Other City employees |
| B. | Receiving call if alarm goes off | Other City employees |
| C. | Miscellaneous repair of chairs, etc. | City mechanics or contracted out |
| D. | Monitoring HVAC equipment | Chad Martin |

11. Emery Stordahl argued that he had been essentially replaced by Chad Martin, but that is not borne out by the evidence in the record. Chad Martin is a mechanical engineer. He was hired by the City in 1984 to supervise the municipal wastewater plant's mechanical systems. His initial title was "mechanical systems engineer" within the wastewater systems division of the community development department. He supervised six people within the wastewater systems division. Then, when the 1985 Moorhead in Motion reorganization was adopted, Martin's position was combined with a number of other positions into a new one labeled "fleet operations manager/HVAC systems engineer" within a new department known as the public works department. Much of the maintenance of HVAC equipment was contracted out to private entities. (Recommendations 75, 33 and 34.) An analysis of Martin's actual job duties in his new position was performed in December of 1986. Ex. 25. It showed him spending the largest block of his time in material handling/inventory control functions, which involved purchasing products and services from outside vendors. The second largest block of his time was spent in vehicle maintenance supervision. The third largest block of his time (only 17.65%) involved building maintenance and repair supervision, such as monitoring, maintaining, and supervising others involved in building heating and cooling functions.

12. In his new position, Martin did become licensed as a boiler inspector. At the time of Stordahl's departure, Stordahl was one of only two boiler inspectors employed by the City. The other inspector was at the Plains Art Museum.

13. There is no question but that Stordahl was a good employee and that his immediate supervisor was well satisfied with his work. The two talked almost daily and he viewed Stordahl as performing high quality work for the City.

14. When the new reorganization took effect on January 1, 1986, Stordahl was one of four to six people who were cut. He and another individual (Leo Heines, the solid waste supervisor) were both senior employees of the City.

Heines was slightly senior to Stordahl.

15. The parties stipulated that at the time that Stordahl was terminated by the City, he was not given any notice of the possible right to request a hearing pursuant to the Veterans Preference Act.

16. On March 15, 1991, Stordahl filed a Petition for Relief with the Department of Veterans Affairs. On March 28, the Department issued its Notice of Petition and Order for Hearing.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs do have jurisdiction in this matter under Minn. Stat. 197.481 and 14.50 (1989). Stordahl did not resign so as to deprive the Commissioner of jurisdiction. Instead, he was constructively terminated.

2. The Notice of Hearing issued by the Department was proper and all relevant substantive and procedural requirements of law and rule have been fulfilled.

3. The Petitioner is a veteran within the meaning of Minn. Stat. 197.447 and is entitled to the rights set forth in Minn. Stat. 197.46.

4. The Petitioner has the burden of proof to establish that he is a veteran whose rights under Minn. Stat. 197.46 were violated by the Respondent.

5. The Respondent failed to give the Petitioner adequate notice of his right to challenge the abolition of his job under Minn. Stat. hence, the Commissioner does have authority to order a hearing in the event that Petitioner is entitled to relief.

6. Under the Veterans Preference Act, public employers may abolish the position held by an honorably discharged veteran if the position is abolished in good faith. Respondent has the burden of proving that it acted in good faith in discontinuing the position.

7. The City of Moorhead has established that it abolished Emery Stordahl's position as building superintendent in good faith and not as a mere pretext to oust him from his employment. Stordahl's duties were not reassigned wholesale to another employee or otherwise transferred so as to suggest bad faith, nor was the Moorhead in Motion reorganization a pretext for ousting him. See Memorandum.

8. Petitioner's veterans preference rights were not violated by the Respondent and the Petitioner is not, therefore, entitled to an Order for reinstatement, back pay, a hearing on just cause or any other relief.

9. These Conclusions are made for the reasons set forth in the Memorandum, which is attached and hereby made a part of them.

Based upon the foregoing Conclusions, the Administrative Law Judge makes
the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs deny the Petition of Emery Stordahl in this matter.

Dated this 19th day of August, 1991.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded, Not Transcribed.

MEMORANDUM

The Veterans Preference Act, Minn. Stat. 197.46, et seq., states, among other things, that a veteran who has been honorably discharged cannot be removed from a position of public employment "except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing". A public employer must notify any veteran discharged from an appointment position of the veteran's right to request a hearing on the discharge. However, the courts have recognized that the Veterans Preference Act does not prevent public employers from abolishing positions in good faith. State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.H. 30 (1923). Hence, public employers may abolish a position and lay off a veteran without violating the act if the layoff is made in good faith. A lack of good faith is established if the veteran can show that the position was actually continued under some other name or that the veteran's duties were merely reassigned to some other employee. Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986) and 410 N.W.2d 27 (Minn. App. 1987); Gorecki v. Ramsey County, 437 N.W.2d 646 (Minn. 1989). In the latter case, the court noted as follows:

In examining the conduct of this public employer, we are guided by two separate principles. The first is that the Veterans Preference Act itself was designed to "take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removal for cause." [Citations omitted.] See also, Johnson v. Village of Cohasset, 263 Minn. 425, 435,

116 N.W.2d 692, 699 (1962) (VPA protects honorably discharged veterans from the ravages of a political spoils system). While the impact of political decisions upon a veteran's employment are minimized, the Act cannot

be viewed as fully restricting the government's exercise or control over its administrative affairs The second principle is one requiring this court to examine the substance of the administrative decision rather than its mere form. See *Myers v. City of Oakdale*, 409 N.W.2d 848 (Minn. 1987).

437 N.W.2d 646, 650.

There is language in the Supreme Court's *Young* decision (386 N.W.2d 732) that states an employer cannot abolish a position, terminate a veteran, and then reassign the duties to nonveterans. 386 N.W.2d at 738-39. In that case, there was no blatant firing of one person (a veteran) and immediate hiring of another (a nonveteran) who was given all of the duties of the veteran. That would be an easy case to label as "bad faith", and it has been so held by the courts for many years. see, for example, *State ex rel. Tamminen v. City of Eveleth*, 189 Minn. 229, 249 N.W. 184 (1933). What happened in *Young* was the abolishing of a position, the termination of a veteran, and then the parceling out of "all or substantially all" of his duties to other nonveterans. In addition, there was a suggestion that a substantial reason that *Young* was terminated was the fact that he was paid more than most of his coworkers, and the City could retain more of the younger employees who were earning substantially less money if they terminated *Young* and farmed out his work to the lower paid workers. The Court, in *Young*, held that *Young* was entitled to the protection of the Act if the City had merely reassigned his duties to nonveterans less senior than he.

In applying the holding of *Young* to *Stordahl's* situation, two matters emerge as differentiating the two cases. First of all, the work performed by *Young* was all (or substantially all) reassigned to other employees. That did not happen in *Stordahl's* case, where much of his prior work was dropped. Secondly, there was evidence of a pay differential as a motivating factor in *Young*; there is no such evidence in *Stordahl's* case. Instead, *Stordahl's* position was part of a bona fide city-wide reorganization that was driven by factors having nothing to do with *Stordahl* or his performance. Therefore, *Young* does not control the outcome of this case.

There is no evidence in this record that Petitioner's position was abolished in bad faith, that the reasons advanced were a mere pretext for ousting him, or that the position was continued in some subrosa fashion. The

City was satisfied with his work at the time, and would have allowed him to stay on but for the reorganization.

There is also no question but that the reorganization was a legitimate one. There are 96 recommendations for action that occupy 41 pages of text. Approximately eight months after the City Council adopted the plan, there was a review of progress on all the recommendations, and each one was examined to see whether or not it had been accomplished. That review indicated that 62% had been completed and 28% were in progress. Only seven percent were labeled "no action to date". While Mr. Stordahl's age and length of service were such that he could have earned a larger retirement benefit if the City would have been willing to keep him on until he reached age 65, his forced retirement was part of a much larger plan that, in no way, can be said to have been "cooked up" to create a pretext for ousting him.

When there is a legitimate, good faith abolition of a position, an employer is not required to afford a veteran any special protection.

A.W.K.